

NO. 84-715

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1984

STATE OF ALABAMA AND
CHARLES A. GRADDICK,
ATTORNEY GENERAL, PETITIONERS

VS.

DARRYL PRUITT, RESPONDENT

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT
(PRIOR TO FINAL JUDGMENT)

REPLY BRIEF AND ARGUMENT

OF

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ATTORNEY GENERAL

AND

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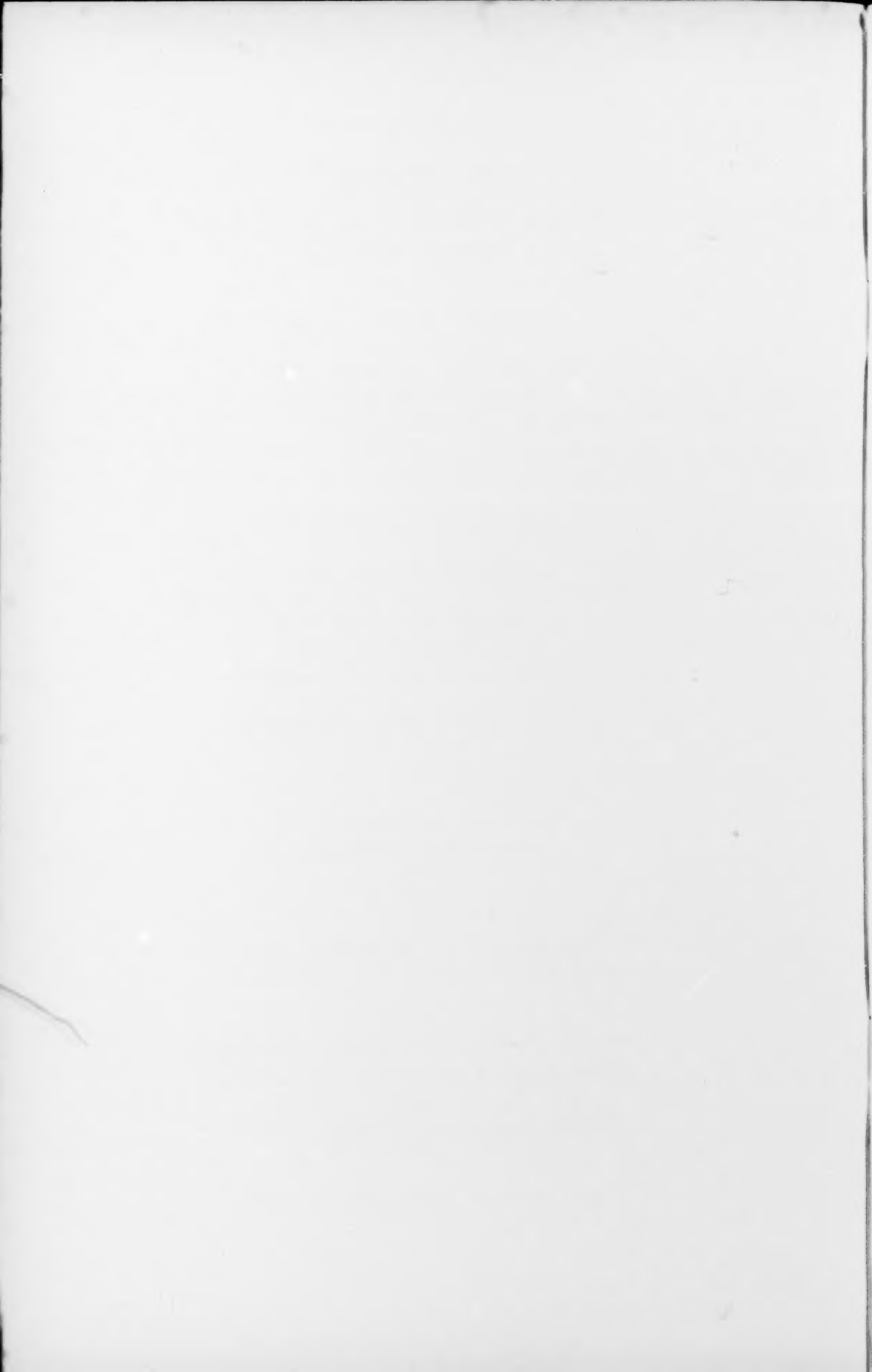


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RESPONSE TO RESPONDENT'S
STATEMENT OF THE FACTS

The Respondent's statement of the facts seems to suggest that it was unnecessary for Officer Kidd to shoot in order to effect the arrest of the Respondent, or, to put it another way, the Respondent suggests that Officer Kidd acted improperly under Section 13A-3-27, Code of Alabama, 1975. The Petitioners point out that, without in anywise conceding its validity, such a suggestion contradicts nothing in the Petition. The Petitioners are not here to defend Officer Kidd, the City of Montgomery, or anyone or anything, except the constitutionality of Section 13A-3-27, Code of Alabama, 1975.

SUMMARY OF THE REPLY ARGUMENT

1. The Respondent's argument on the significance of Tennessee v. Garner (No. 83-1035) and Memphis Police Department v. Garner (No.83-1070) to this case is contradicted by the position he takes in the Court of Appeals. See the Petition, Appendix "E". The Alabama statute has, through no fault of the People or officials of Alabama, been in constitutional limbo for nearly five years. This untenable situation will prevail until this Honorable Court acts authoritatively.

2. The Common Law Rule and the Alabama Statute balance the rights and protection of society, arrestees, and officers with a clear and practical rule. In striking down that Rule, the District Court established a confusing rule, which is primarily concerned with protecting

resisting arrestees. It is universally recognized that the resisted arrest situation creates a risk to life and limb; why should officers and society assume that risk rather than the felon who creates it? The District Court established a rule which creates doubt and confusion in life threatening situations. This Honorable Court ought to act now to establish a workable rule governing the use of deadly force in arrests.

REPLY ARGUMENT

I.

THE IMPACT OF GARNER ON THIS CASE

This Honorable Court clearly has jurisdiction to entertain the instant Petition. 28 U.S.C. 1254(1). The issue here is: Should the Court exercise its jurisdiction?

As pointed out in the Petition, this case meets all of the criteria for the granting of the writ prior to final judgment in the Court of Appeals. Petition, pages 21-27. However, the most important consideration in the Petitioners' opinion and apparently also that of the Respondent, is the pendency of Tennessee v. Garner (No. 83-1035) and Memphis Police Department v. Garner (No. 83-1070) in this Honorable Court. The Respondent argues that Garner is of little significance in this case. Yet, the Respondent took the exact opposite position in his motion to stay in the Court of Appeals. Appendix "E" to the Petition. The first sentence of each paragraph of Respondent's motion clearly demonstrates the importance of Garner to this case.

"1. The Garner litigation, pending in the U.S. Supreme Court, presents an issue which controls the disposition of this case...." (Appendix "E", p. 29; emphasis supplied).

"2. The decision of the district court challenged in the instant case rests on the same legal proposition at issue in Garner...." (Appendix "E", p. 30; emphasis supplied).

"3. Because the outcome of Garner will have a profound impact on the law that controls this case, plaintiff submits that it would be appropriate for this Court to stay the instant appeal until a decision is issued in Garner...." (Appendix "E", p. 32-33).

Having so argued in the Court of Appeals, how can the Respondent argue the opposite way in this Court? It seems that the Respondent's primary interest is in preventing the People of Alabama from defending their statute anywhere.

The Respondent asked the District Court to declare the Statute unconstitutional. The District Court did so and on

that basis and that basis alone, granted summary judgment for the Respondent against Officer Kidd and the City on the issue of liability. Now, the Respondent argues:

"...'[F]ew propositions are better established than that constitutional adjudication should be avoided whenever possible.' Life Insurance Co. of North America v. Reichardt, 591 F.2d 499, 506 (9th Cir., 1979)...." (Respondent's Brief, p. 19).

This is good law, but it is a principle the Respondent should have embraced in the District Court. The Alabama statute should not have been declared unconstitutional, but it was at the insistence of the Respondent. Section 13A-3-27 Code of Alabama, 1975, has been in constitutional limbo since Ayler v. Hopper (532 F.Supp. 198 [M.D.Ala., 1981]) (See the Petition, pp. 4-7), and this has been through no fault of the People or Officers of the

State of Alabama. At the present time, Alabama officers have no clear law to guide them in the use of deadly force in making arrests, and this untenable situation will prevail until this Honorable Court either upholds the Statute or provides a clear and workable alternative.

II.

IT IS IMPERATIVE THAT THE CONFUSION CREATED BY THE DISTRICT COURT BE RESOLVED

The Respondent argues that a resolution of the constitutionality of Section 13A-3-27 is not imperative, since the District Court allegedly gave Alabama officers a workable alternative role. It is interesting to notice that in making this argument, the Respondent "cleans up" the District Court's Rule considerably. Respondent's Brief, p.34.

The Rule of the District Court in the instant case would allow the use of deadly force only "...to prevent imminent, or at least a substantial likelihood of death, or great bodily harm...." Ayler v. Hopper, 532 F.Supp. 198, 201 (M.D.Ala., 1981); Petition, Appendix "A", pages 6-7. What exactly is "a substantial likelihood of death or great bodily harm...."? An unarmed, youthful, 220 lb., six feet tall resisting arrestee could no doubt pose "...a substantial likelihood of death or great bodily harm..." to a diminutive or elderly police officer but would pose little such likelihood to his or her more burly colleague. Of course, the size, age and state of health, of a resisting arrestee is usually impossible to judge at the time. Would such a rule allow an officer to use deadly force to stop a

mass murderer or an escapee from death row, who presented no imminent danger to anyone? Maybe, but probably not.

The Respondent argues that the Rule established by the District Court does not call for hindsight review. This assertion is made in the face of the fact that the District Court applied its Rule and granted judgment for the Respondent on the basis of numerous facts (e.g. the Respondent's being unarmed; the fact that no burglary had occurred), which were unknown and unknowable to the officer when he acted.

If the Rule established by the District Court on June 12, 1984 (Petition, Appendix "A", pp. 1-11) was difficult to apply, it was made impossible by the amendment of July 26, 1984. (Petition, Appendix "A", pp. 12-13). This amendment concludes:

"...Although Kidd testified that he initially feared an attack from Pruitt, his deposition testimony repeatedly indicates that Kidd's own subjective concern was for effecting Pruitt's arrest, and not for his own or another's safety...." (Appendix "A", page 13, emphasis supplied).

In the District Court's view, Kidd was unjustified in using deadly force, because his "heart was in the wrong place."

The District Court's Rule is utterly unworkable. As with all of the rules advanced in the place of the Common Law Rule, the justification for the use of deadly force is to an undefined degree subjective and is a function of numerous factors which would normally be impossible for the officer to judge at the time. The rules advanced in the place of the Common Law Rule are designed to guide courts in after-the-fact review

of officers' actions. They are entirely impractical in guiding officers at the time of the action.

The Common Law Rule, on the other hand, has for centuries provided officers with clear and easily applied guidance in resisted arrest situations. The Common Law Rule looks to objective factors, such as the legality of the arrest, the nature of the crime and the necessity of the force. In order to make a lawful arrest, an officer must have a warrant or probable cause to believe that the arrestee has committed some crime. Distinguishing between felonys and misdemeanors is a simple matter of familiarity with the criminal code. Determining the force necessary to effect an arrest is a simple matter of gradually escalating the force until the arrest is complete. Just as

officers can, under the Common Law Rule, know quickly and clearly what their duties and immunities are, so can an arrestee ascertain the risk he would be running should he choose to resist.

As stated in the Petition, the Common Law Rule always comes before the Courts in worst case senarios. It is, therefore, not surprising that the controversary over the Common Law Rule is grounded primarily on sympathy. The critics of the rule sympathize with resisting arrestees; their concern for society and police officers arises as almost as an afterthought. For example, these critics would bar an officer from using his or her firearm, unless the resisting arrestee is armed. Yet, in most of the situations where the problem arises, a muzzel-flash in the dark may be the first and perhaps the last, indica-

tion an officer has that a resisting arrestee is armed. The Common Law Rule, on the other hand, reflects balanced concern for society, the arrestee and the officer: Society is assured that if there is any way that the officer can effect a lawful felony arrest, he or she will do so. The arrestee can fully protect himself from both deadly and non-deadly force by obeying the law and submitting to lawful arrest. Finally, the Common Law Rule minimizes the risk run by an officer who must pursue an unknown lawbreaker, who may or may not be dangerous to the officer and who may or may not be armed.

The danger inherent in any resisted arrest situation is universally recognized. The District Court, in common with others who condemn the Common Law Rule, would allow the resisting

arrestee the first move toward deadly force. Given that the resisted arrest situation creates danger to life and limb, why should officers and society assume that risk, rather than the felons who unlawfully create it?

In this case the District Court struck down a ancient rule which for centuries has promoted safety, the law and justice. In the place of this sound and practical rule, the District Court created confusion and doubt in life threatening situations. This untenable state of affairs will continue until this Honorable Court acts. It is imperative that the Alabama statute be either upheld or replaced with a practical rule, and only this Court can do that authoritatively.

CONCLUSION

In conclusion, the Petitioners point out that this proceeding may as, a practical matter, be the only opportunity the People of Alabama have to defend their Statute. For this reason and those stated in their Petition, the Petitioners pray that this Honorable Court grant their petition.

Respectfully submitted,

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ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for Charles A. Graddick, Attorney General and the State of Alabama, Petitioners, do hereby certify that on this ____ day of December, 1984, I did serve the requisite number of copies of the foregoing on the Attorneys for all of the other parties in the Court of Appeals, by mailing the same to them first-class postage prepaid and addressed as follows:

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